

The Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

BRIAN CLAIBORNE,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal  
Corporation, CITY OF SEATTLE POLICE  
DEPARTMENT and SEATTLE POLICE  
OFFICER BRIAN HUNT,

Defendants.

No. C06-1061RSM

**PLAINTIFF'S TRIAL BRIEF**

**I. FACTS**

On June 6, 2004 at approximately 2:00 a.m. plaintiff Brian Claiborne was driving home from work in his car. Mr. Claiborne was working for a cleaning company and had been stripping and waxing floors in the Ballard neighborhood of Seattle, Washington. Mr. Claiborne was driving his Nissan station wagon that was registered in his name.

Mr. Claiborne was stopped by defendant Seattle Police Officer Brian Hunt near the intersection of 10<sup>th</sup> Ave NE and East Pike Street in Seattle. Defendant Hunt informed Mr.

1 Claiborne that the license plates on his car were not the correct license plates<sup>1</sup>. Defendant Hunt  
2 called Mr. Claiborne “boy” and a “nigger” and stated that Mr. Claiborne must be drunk if he  
3 does not know that he has the wrong license plates on his car. Mr. Claiborne states that he does  
4 not drink and he had not been drinking that night. Defendant Hunt then grabbed Mr. Claiborne  
5 by the hair and by his collar and pulled him out of the car. Defendant Hunt slammed Mr.  
6 Claiborne’s face against the car three times. Mr. Claiborne claims he suffered chipped, cracked,  
7 and jammed teeth as a result of defendant Hunt’s actions.

8 Seattle Police Officer Kevin Runolfson arrived at the scene and transported Mr.  
9 Claiborne to the police station. Mr. Claiborne claims that he was not given a field sobriety test  
10 and he was not given a portable breath test at the scene. Mr. Claiborne was given several  
11 breathalyzer tests at the police station. Mr. Claiborne claims the results of the first ones showed  
12 that he had no alcohol in his system. Mr. Claiborne was unable to take the sixth test because he  
13 was out of breath. Mr. Claiborne was charged with DUI and that charge was dismissed when  
14 Officer Runolfson did not appear for the trial.

15 Mr. Claiborne had cleaning equipment (a mechanical floor stripper and a floor waxer)  
16 valued at \$7,000 in his car at the time of his arrest. The equipment belonged to his employer.  
17 Mr. Claiborne remained in jail for an extended period of time and was therefore unable to get his  
18 vehicle out of impound and was unable to get the cleaning equipment back to his employer. Mr.  
19 Claiborne’s car was sold, apparently with the equipment still in it.

20  
21  
22 <sup>1</sup> Mr. Claiborne had taken his car to a mechanic. The mechanic had had license plates stolen off of his customers’  
23 vehicles in the past, so the mechanic removed the license plates Mr. Claiborne’s car so that they would not be stolen  
24 while on the mechanic’s property. When Mr. Claiborne picked up his car from the mechanic, the mechanic  
mistakenly put the wrong license plates on Mr. Claiborne’s car.

1 Mr. Claiborne was evicted from his apartment while he was incarcerated and all of his  
 2 personal belongings were lost, including a vast record collection that he had received from his  
 3 father. Mr. Claiborne also lost his job due to the arrest. Mr. Claiborne is now homeless. Mr.  
 4 Claiborne suffers from depression and needs surgery to fix his teeth.

## 5 **II. CAUSES OF ACTION**

6 The following causes of action will be pursued at trial:

- 7 1. 42 U.S.C. § 1983 excessive force claim against defendant Hunt;
- 8 2. State law outrage claim against defendant Hunt; and
- 9 3. State law negligence claim against the City of Seattle.

### 10 **A. 42 U.S.C. § 1983 excessive force claim against defendant Hunt**

11 42 U.S.C. § 1983 establishes, in pertinent part:

12 Every person who, under color of any statute, ordinance, regulation, custom, or  
 13 usage, of any State or Territory or the District of Columbia, subjects, or causes to  
 14 be subjected, any citizen of the United States or other person within the  
 jurisdiction thereof to the deprivation of any rights, privileges, or immunities  
 secured by the Constitution and laws, shall be liable to the party injured in an  
 action at law...

15 42 U.S.C. § 1983.

16 Mr. Claiborne's rights were violated under color of law when defendant Hunt used  
 17 excessive force during the traffic stop and detention. There is no question that defendant Hunt  
 18 was operating under color of state law during the incident. A claim that excessive force was  
 19 used in affecting an arrest or during an investigatory stop raises Fourth Amendment issues.  
 20 *Graham v. M.S. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Such a  
 21 claim is analyzed under the Fourth Amendment's "reasonableness" standard. *Id.* at 395. The  
 22 reasonableness test,

23 requires careful attention to the facts and circumstances of each particular case,  
 24 including the severity of the crime at issue, whether the suspect poses an

1 immediate threat to the safety of the officers or others, and whether he is actively  
2 resisting arrest or attempting to evade arrest by flight.

3 *Id.* at 397. The reasonableness of the use of force is to be judged from the perspective of “a  
4 reasonable officer on the scene.” *Id.*

5 Mr. Claiborne need not prove significant physical injury to prevail on his excessive force  
6 claim. *Busch v. Torres*, 905 F.Supp. 766 (C.D.Cal. 1995) lists “significant physical injury” as  
7 one of the elements of an excessive force claim. *Busch* at p. 772. The court in *Busch* looked to  
8 *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir.1989) for the elements of an excessive force claim.  
9 However, the Fifth Circuit held in 1994 that the *Johnson v. Morel* elements of an excessive force  
10 claim are no longer valid. *Harper v. Harris County Texas*, 21 F.3d 597 (5<sup>th</sup> Cir. 1994).

11 Specifically, the court in *Harper* held that, “[a] **plaintiff is no longer required to prove**  
12 **significant injury to assert a section 1983 Fourth Amendment excessive force claim.**” *Harper*  
13 at 600 (emphasis added). The *Harper* court so ruled because the United States Supreme Court,  
14 “overruled the significant injury prong in an Eighth Amendment excessive use of force context.”  
15 *Harper* at 600 (citing *Hudson v. McMillan*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)).

16 The district court’s reliance in *Busch* on *Johnson v. Morel* was erroneous. Mr. Claiborne need  
17 not prove that he suffered significant physical injury as a result of defendant Hunt’s use of  
18 excessive force. Nevertheless, Mr. Claiborne intends to prove at trial that he suffered injury to  
19 his teeth.

20 Defendant Hunt’s use of force was excessive. The severity of the crime at issue was  
21 minimal – a suspicion of DUI by defendant Hunt based purely on the fact that Mr. Claiborne had  
22 the wrong license plates on his car. Mr. Claiborne posed no threat to defendant Hunt or to  
23 others. Mr. Claiborne remained calm throughout the incident and did not resist, even when  
24

1 defendant Hunt was hitting his face against the car. A reasonable officer at the scene would not  
 2 have used the level of force that defendant Hunt used against Mr. Claiborne.

3 **B. State law outrage claim against defendant Hunt**

4 Washington has adopted the Restatement (Second) of Torts, §46(1), (2), and (2)(a)  
 5 definition of outrage. *Grimsby v. Samson*, 85 Wn.2d 52, 60, 530 P.2d 291 (1975). The basic  
 6 elements of the tort of Outrage are:

7 (1) extreme and outrageous conduct;

8 (2) intentional or reckless infliction of emotional distress; and

9 (3) actual result to the plaintiff of severe emotional distress.

10 *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts §46  
 11 (1965).

12 “When one in a position of authority, actual or apparent, over another has allegedly made  
 13 racial slurs and jokes and comments, this abusive position gives added impetus to the claim of  
 14 outrageous behavior.” *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741 (1977) (*citing*  
 15 Restatement (Second) of Torts 46, comment E). “The relationship between the parties is a  
 16 significant factor in determining whether liability should be imposed.” *Id.* “Plaintiff’s own  
 17 susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact,  
 18 and cannot be determined on demurrer’ . . . It is for the trier of fact to determine, taking into  
 19 account changing social conditions and plaintiff’s own susceptibility, whether the particular  
 20 conduct was sufficient to constitute extreme outrage.” *Id.* at 741-42 (*quoting Alcorn v. Anbro*  
 21 *Engineering, Inc.*, 2 Cal.3d 493, 498-99, 468 P.2d 216, 86 Cal.Rptr. 88 (1970).

22 A uniformed, armed, on-duty police officer is in a position of considerable actual  
 23 authority over a person stopped by that officer. Mr. Claiborne has testified at deposition, and  
 24 will testify at trial that defendant Hunt called him “boy” and “nigger” during the traffic stop. It

1 is extreme and outrageous behavior for a police officer to use such despicable racial slurs. For  
 2 that officer to accuse a sober driver of being drunk and to initiate a DUI investigation of that  
 3 sober driver is also extreme and outrageous behavior. Defendant Hunt must know that an  
 4 unwarranted assertion of power over an innocent and cooperative citizen accompanied by the use  
 5 of racial slurs and excessive force will inflict emotional distress upon that citizen, supporting a  
 6 claim that defendant Hunt's infliction of emotional distress upon Mr. Claiborne was intentional.  
 7 At the very least, defendant Hunt's infliction of emotional distress upon Mr. Claiborne was  
 8 reckless.

9 Mr. Claiborne need not show objective symptomatology (such as a diagnosable disease,  
 10 illness, or physical injury) of his emotional distress. In *Brower v. Ackerley*, 88 Wn. App. 87, 99-  
 11 100, 943 P.2d 1141, *rev. denied*, 134 Wn.2d 1021 (1998), the court held:

12 [The objective symptomatology] requirement, however, belongs to the tort of negligent  
 13 infliction of emotional distress. No Washington case has incorporated it into the tort of  
 outrage. The restatement has recognized that bodily harm is not necessary.

14 *Brower* at 99-100 (internal cites omitted). *Brower* cited the Restatement (Second) of Torts §46,  
 15 comment j, which states that "in many cases the extreme and outrageous character of the  
 16 defendant's conduct is in itself important evidence that the distress has existed."

17 Mr. Claiborne has suffered severe emotional distress. He has testified at deposition, and  
 18 will testify at trial, that he suffered from depression following the incident and was to the point  
 19 where he wanted to die.

### 20 **C. State law negligence claim against the City of Seattle**

21 "An employer may be liable for harm caused by an incompetent or unfit employee if (1)  
 22 the employer knew, or in the exercise of ordinary care, should have known of the employee's  
 23 unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the

1 plaintiff's injuries." *Betty Y. v. Al-Hellou*, 98 Wn. App. 146 (1999), 148-49, 988 P.2d 1031  
 2 (*citing Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252, 868 P.2d 882 (1994)).

3 Plaintiff expects to present evidence at trial that the City of Seattle knew or should have  
 4 known of defendant Hunt's unfitness to work as a police officer and that their retention of  
 5 defendant Hunt proximately caused Mr. Claiborne's injuries – had defendant Hunt not been  
 6 working as a police officer at the time of the incident Mr. Claiborne would not have been pulled  
 7 over in the first place and would not have been subjected to the use of excessive force.

### 8 **III. DAMAGES**

9 Mr. Claiborne seeks special damages for past and future medical expenses, the loss of his  
 10 vehicle, the loss of the cleaning equipment in his vehicle, and the loss of personal belongings  
 11 such as his record collection.

12 Mr. Claiborne seeks general damages for past and future physical and psychological pain  
 13 and suffering and loss of enjoyment of life.

14 Mr. Claiborne seeks punitive damages against defendant Hunt based upon defendant  
 15 Hunt's evil motive or intent, and/or his reckless or callous indifference to the federally protected  
 16 rights of Mr. Claiborne.

### 17 **IV. JUROR QUESTIONNAIRE**

18 Plaintiff requests that the Court have the members of the venire fill out the attached Juror  
 19 Questionnaire which is modeled after the questionnaire used in *Hankin, et al. v. City of Seattle*,  
 20 United States District Court, Western District of Washington, Cause No. C00-1672P. Counsel  
 21 for defendants' office represented the defendant City of Seattle in that case and gave input on  
 22 this questionnaire for its use.

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